

EXHIBIT A

USBC, District of NJ
C.A. No. 2:11-cv-01754-JLL-JAD

Williams, et al. v. BASF Catalysts, LLC, et al.
Oral Argument

Monday
April 2, 2018

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3 CIVIL ACTION NO. 2:11-cv-01754-JLL-JAD

4 KIMBERLEE WILLIAMS, et al.,
5 Plaintiffs,

6 vs.

7 BASF CATALYSTS, LLC, et al.,
8 Defendants.

9 -----
10 Monday, April 2, 2018
11 -----

12 Stenographic Transcript of Oral
13 Argument, taken at the law offices of Ballard Spahr,
14 1735 Market Street, 48th Floor, Philadelphia, PA,
15 before Robert J. Boccolini, Certified Court Reporter,
16 on the above date, commencing at 2:00 p.m., there
17 being present:

18 BALLARD SPAHR, LLP
19 Woodland Falls Corporate Park
20 210 Lake Drive East, Suite 200
21 Cherry Hill, NJ 08002
22 BY: ROBERTO RIVERA-SOTO, ESQ.
23 SPECIAL MASTER
24 WILLIAM P. REILEY, ESQ.

25

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23 Certified Court Reporters
24 The Ironstone Village
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| <p>1 who's involved? The in-house counsel, Hassett's 2 involved, the lawyers at Cahill Gordon are involved, 3 Mr. Dornbusch is involved.</p> <p>4 And so what happens after this?</p> <p>5 SPECIAL MASTER: Well, what would you 6 expect?</p> <p>7 MR. PLACITELLA: That's what I would 8 expect, that they would have --</p> <p>9 SPECIAL MASTER: That they have a piece 10 of litigation that came in that seems to track a 11 prior piece of litigation. I would think that the 12 lawyers would want to talk to each other in respect 13 of it.</p> <p>14 MR. PLACITELLA: Absolutely. I agree 15 with you 100 percent.</p> <p>16 SPECIAL MASTER: Okay. So why is this 17 proof of anything --</p> <p>18 MR. PLACITELLA: Because --</p> <p>19 SPECIAL MASTER: -- other than lawyers 20 acting like lawyers should be acting?</p> <p>21 MR. PLACITELLA: Because this is what 22 happened. The case was quietly settled. They got 23 the Glassley evidence back from Elizabeth Quizone.</p> <p>24 And from 2005 when this information was 25 found until it was produced to me in 2010, it was</p> | <p>1 SPECIAL MASTER: Okay. Because 2 remember, we know that Westfall was settled in May -- 3 or May or June of 1983. And as we talked earlier --</p> <p>4 MR. PLACITELLA: Actually I made a 5 mistake.</p> <p>6 SPECIAL MASTER: Okay.</p> <p>7 MR. PLACITELLA: There are documents 8 that we've requested that go back to 1978 and 1979. 9 So I made a mistake.</p> <p>10 SPECIAL MASTER: Okay. And what's your 11 basis for asking for those documents?</p> <p>12 MR. PLACITELLA: Our basis is that they 13 are documents that we believe that were authored by 14 scientists, not lawyers.</p> <p>15 One, we'll get into it later, we don't 16 think they're privileged at all. But if they are 17 privileged and they are about talc testing, which is 18 what they say, and they make the representation that 19 the documents did not exist, then that's fraud. If 20 they had the documents -- if they had documents in 21 their possession about talc testing --</p> <p>22 SPECIAL MASTER: So you're saying 23 basically that based upon the representations made 24 later on, you're able to bootstrap back to the 25 documents that were made when there was no proof of</p> |
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| <p>1 never produced again.</p> <p>2 And the same letters went out to counsel 3 saying there was no evidence of asbestos in the Emtal 4 talc.</p> <p>5 Summary judgment motions were granted 6 and made based upon at least in part on those 7 statements.</p> <p>8 And at this point in time they can't say 9 we have no idea that that file existed anymore. They 10 had the file. They had discussions. They discussed 11 a strategy.</p> <p>12 There is no I submit excuse from 2005 13 until 2010 for letters to have gone out to 14 plaintiffs' lawyers and briefs to be filed with 15 courts and interrogatories to be answered to say that 16 there's no evidence of asbestos in the talc.</p> <p>17 SPECIAL MASTER: Okay. Tell me what is 18 the time period in your updated Appendix C between 19 the oldest and the most recent document that you are 20 requesting be subject to the crime fraud exception?</p> <p>21 MR. PLACITELLA: The time period -- 22 there are documents from the early 80s. And then 23 there are documents from --</p> <p>24 SPECIAL MASTER: Early 80s when?</p> <p>25 MR. PLACITELLA: I'm assuming 1982, '83.</p> | <p>1 any wrongdoing going on for their disclosure?</p> <p>2 MR. PLACITELLA: I wouldn't phrase it 3 that way. What I would say is --</p> <p>4 SPECIAL MASTER: Well, tell me how what 5 I just said is wrong? Whether you'd phrase it in a 6 different way or not, how is what I said wrong?</p> <p>7 MR. PLACITELLA: Because if 8 representations were made that there was no evidence 9 of asbestos in the talc and they had evidence and 10 they're keeping that evidence -- and they're putting 11 that evidence behind a privilege, that's fraud.</p> <p>12 SPECIAL MASTER: Do me a favor. Can you 13 repeat the question?</p> <p>14 Mr. Placitella, pay attention to the 15 question, please.</p> <p>16 THE REPORTER: So you're saying 17 basically that based upon the representations made 18 later on, you're able to bootstrap back to the 19 documents that were made when there was no proof of 20 any wrongdoing going on for their disclosure?</p> <p>21 SPECIAL MASTER: Yes or no?</p> <p>22 MR. PLACITELLA: Yes. But I have to 23 qualify it because --</p> <p>24 SPECIAL MASTER: Okay. Qualify it. But 25 at least I've got an answer.</p> |

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| <p style="text-align: center;">Page 162</p> <p>1 MR. PLACITELLA: Yes, because I'm 2 putting aside whether they were doing anything wrong 3 with respect to their customers at the time. 4 SPECIAL MASTER: Well, you're not 5 representing customers in this case. 6 MR. PLACITELLA: Okay. 7 SPECIAL MASTER: You're not representing 8 customers in this case. Customers are not parties to 9 this case. 10 If you want to amend your complaint and 11 you can find yourself a representative customer 12 plaintiff, that's a different story altogether. I 13 doubt you're going to get leave to do that at this 14 point. 15 MR. PLACITELLA: I'm sure I wouldn't. 16 SPECIAL MASTER: But be that as it may, 17 I'm pretty sure you wouldn't either. But I'm not 18 telling you what to do. 19 So we're talking about the people who 20 you do represent and the class of people that they 21 would like to be representative of. And those are 22 all folks who had claims that were either not 23 brought, were dismissed, or were settled for token 24 amounts based upon the representations made. 25 And you would agree with me that the</p> | <p style="text-align: center;">Page 164</p> <p>1 Westfall case. 2 MR. PLACITELLA: I'm not aware if 3 that -- but the problem is -- the following problem 4 exists, however, because so much of what was in the 5 Westfall case doesn't exist anymore, it's hard to 6 give an unqualified answer to that, because so much 7 of the file is gone, because so many of the 8 scientific exhibits that are addressed in the 9 depositions are gone, because some of the exhibits 10 were binders full of exhibits without a lot of 11 delineation, it's hard to say whether they produced 12 everything. 13 As I sit here, I'm not aware of any 14 affirmative act by the lawyers in the Westfall case 15 to withhold evidence. 16 SPECIAL MASTER: Let me ask you that 17 question more directly. Do you have anything to 18 support the notion that anything was improperly 19 withheld from disclosure in the Westfall case? Not 20 surmise. Not I have an itch that needs to be 21 scratched. 22 Do you have something you can put on the 23 table that tells me that something untoward occurred 24 in the Westfall case? My sense is no, but... 25 MR. PLACITELLA: I want to tell you why</p> |
| <p style="text-align: center;">Page 163</p> <p>1 representations up until the settlement of the 2 Westfall case were accurate, they did produce the 3 information that they had?</p> <p>4 MR. PLACITELLA: In the context of 5 litigation.</p> <p>6 SPECIAL MASTER: In the context of 7 litigation. That it was only after the Westfall case 8 was settled that someone decided that they needed to 9 put all this under a very -- in a very deep, dark 10 hole and not produce it.</p> <p>11 So I don't understand your qualification 12 to the answer to my question.</p> <p>13 MR. PLACITELLA: I'll answer it more -- 14 the answer is -- I believe the answer is yes, that I 15 do not have information that I can think of as I'm 16 sitting here right now.</p> <p>17 SPECIAL MASTER: That's the only time 18 that matters.</p> <p>19 MR. PLACITELLA: In the context of what 20 happened in Westfall, they were withholding 21 information. And the only reason I say that --</p> <p>22 SPECIAL MASTER: No one's made any claim 23 that information was withheld in Westfall, have they?</p> <p>24 You have haven't. Westfall hasn't. No 25 one's claimed that information was withheld in the</p> | <p style="text-align: center;">Page 165</p> <p>1 I hedge on -- I hedge with the response. Let me 2 explain it to you.</p> <p>3 SPECIAL MASTER: Either you have it or 4 you don't.</p> <p>5 MR. PLACITELLA: In the Hemstock 6 deposition, the lawyer stated to the plaintiff's 7 lawyer: You have everything that exists. We've 8 produced everything to you that's called for in the 9 subpoena.</p> <p>10 SPECIAL MASTER: I'm not following what 11 you just said. In the Hemstock deposition?</p> <p>12 MR. PLACITELLA: Yeah. What happened 13 was Hemstock -- there was a subpoena issued for the 14 Hemstock deposition.</p> <p>15 SPECIAL MASTER: In which case?</p> <p>16 MR. PLACITELLA: In the Westfall case.</p> <p>17 SPECIAL MASTER: In Westfall, okay.</p> <p>18 MR. PLACITELLA: And it called for all 19 testing related data. Okay.</p> <p>20 And in the deposition, the lawyer for 21 Engelhard made a statement. The statement was: We 22 have produced to you all relevant data. You have -- 23 he basically said you have everything.</p> <p>24 SPECIAL MASTER: Do you have any reason 25 to believe that was untrue?</p> |

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| <p>1 non-privileged documents to you.</p> <p>2 MR. PLACITELLA: None of which indicate</p> <p>3 that they are test results from the test of the mine</p> <p>4 samples at Georgia Tech.</p> <p>5 SPECIAL MASTER: Okay.</p> <p>6 MR. PLACITELLA: Okay. So if you look</p> <p>7 at the very last document that they rely upon, okay,</p> <p>8 this is the document that Mr. Farrell states -- I'll</p> <p>9 blow it up so you don't have to -- this is the</p> <p>10 document that Mr. Farrell states contains the record</p> <p>11 of the Georgia Tech samples from 1979.</p> <p>12 Georgia Tech sampled 38 rock samples.</p> <p>13 38, okay.</p> <p>14 If you look on this first page, there is</p> <p>15 no reference whatsoever to samples from the mine.</p> <p>16 It's just a general key. And it attaches a chart.</p> <p>17 SPECIAL MASTER: Okay.</p> <p>18 MR. PLACITELLA: Okay. So you go to</p> <p>19 the next page. This is the entire document. It's</p> <p>20 entitled asbestos analysis.</p> <p>21 SPECIAL MASTER: Okay.</p> <p>22 MR. PLACITELLA: And it has codes for</p> <p>23 results and codes for samples. There is no</p> <p>24 reference here to anything that was done at the mine.</p> <p>25 There are some 68 samples here.</p> | <p>1 source.</p> <p>2 And if he doesn't have it, then go back</p> <p>3 to Georgia Tech and say: Well, do you have the</p> <p>4 backup documentation to the schedule of samples</p> <p>5 that's on the next page?</p> <p>6 MR. PLACITELLA: Well, they don't, your</p> <p>7 Honor, because you see where it says that micrographs</p> <p>8 were taken of samples which showed more than trace</p> <p>9 fibers and he -- they turned them over. Those</p> <p>10 samples to -- those micrographs don't exist. That's</p> <p>11 the backup data.</p> <p>12 SPECIAL MASTER: Where does it say there</p> <p>13 that the micrographs have been turned over? Is that</p> <p>14 at the top?</p> <p>15 MR. PLACITELLA: At long last here's the</p> <p>16 data and micrographs of the last three sets of tests</p> <p>17 of asbestos counts.</p> <p>18 SPECIAL MASTER: Does that mean that</p> <p>19 they didn't keep copies of the micrographs?</p> <p>20 MR. PLACITELLA: I don't know. They say</p> <p>21 they don't have anything, so I'm assuming the answer</p> <p>22 is no.</p> <p>23 SPECIAL MASTER: No, no, not them.</p> <p>24 Georgia Tech.</p> <p>25 MR. PLACITELLA: Georgia Tech. They</p> |
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| <p>1 Assuming that what Mr. Farrell says is</p> <p>2 correct that somehow the samples are contained</p> <p>3 herein, there's no way for me to prove this in a</p> <p>4 trial.</p> <p>5 SPECIAL MASTER: Go back to the prior</p> <p>6 document.</p> <p>7 Is Mr. Hubbard still with us?</p> <p>8 MR. PLACITELLA: I have no idea.</p> <p>9 SPECIAL MASTER: Well, have you asked?</p> <p>10 MR. PLACITELLA: No. I have no idea.</p> <p>11 All I know is it's been represented that these are</p> <p>12 the -- these include the tests that were done on the</p> <p>13 ore.</p> <p>14 SPECIAL MASTER: I understand that. But</p> <p>15 you're challenging that. And the way for you to</p> <p>16 challenge that would be for you to take the</p> <p>17 deposition of Mr. Hubbard to find out if he's still</p> <p>18 around and find out from the next page --</p> <p>19 MR. PLACITELLA: Here's the problem --</p> <p>20 SPECIAL MASTER: -- which ones of them</p> <p>21 are -- if he knows or if he's kept records, which</p> <p>22 ones of them are from the Johnson mine and to tell</p> <p>23 you what they mean. That's what I would do.</p> <p>24 I mean, if that's the source and the</p> <p>25 problem is what is this guy saying, well, go to the</p> | <p>1 said they asked Georgia Tech. Georgia Tech doesn't</p> <p>2 have anything.</p> <p>3 So they say they gave the micrographs to</p> <p>4 Engelhardt.</p> <p>5 Now, if you look at -- they say that</p> <p>6 these are the results. How am I going to prove this</p> <p>7 in a trial that these are the results? I can't.</p> <p>8 Right. There are --</p> <p>9 SPECIAL MASTER: Well, how are they</p> <p>10 going to prove that they are the results?</p> <p>11 MR. PLACITELLA: That's a good question.</p> <p>12 That's why I'm saying -- that's why I'm saying --</p> <p>13 SPECIAL MASTER: I'm sure they have an</p> <p>14 idea.</p> <p>15 MR. PLACITELLA: That's why I'm</p> <p>16 saying --</p> <p>17 SPECIAL MASTER: Well, let me change</p> <p>18 that. I hope you have an idea.</p> <p>19 MR. FARRELL: I'm confused myself,</p> <p>20 because if all the request is for a stipulation that</p> <p>21 38 rock samples were in the document, I'll stipulate</p> <p>22 that now and he can use that to prove it at trial.</p> <p>23 MR. PLACITELLA: I don't want a</p> <p>24 stipulation. I want the backup. Where did the</p> <p>25 samples come from?</p> |

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| <p>1 SPECIAL MASTER: You know, you don't --</p> <p>2 MR. PLACITELLA: No, no. It's</p> <p>3 important. It's important.</p> <p>4 SPECIAL MASTER: I understand it's</p> <p>5 important. But you don't get to play both sides.</p> <p>6 Okay.</p> <p>7 If complained complaint is I don't know</p> <p>8 what's in here and counsel is willing to stipulate</p> <p>9 that what you're looking for is in there --</p> <p>10 MR. PLACITELLA: How do they know that,</p> <p>11 your Honor?</p> <p>12 SPECIAL MASTER: Well, I don't know.</p> <p>13 They may have a Ouija board that they consult that</p> <p>14 tells them these things. I don't know that.</p> <p>15 MR. PLACITELLA: Well, if they're</p> <p>16 consulting something that's not in the record, I have</p> <p>17 a right to know that.</p> <p>18 SPECIAL MASTER: Well, isn't that a</p> <p>19 conversation you should be having with Mr. Farrell</p> <p>20 and not with me, who seems to be, all things</p> <p>21 considered, a pretty nice guy. Notice I qualified</p> <p>22 that, okay.</p> <p>23 MR. FARRELL: I wouldn't expect anything</p> <p>24 else.</p> <p>25 SPECIAL MASTER: Okay. So I mean, I</p> | <p>1 me.</p> <p>2 MR. PLACITELLA: But that's kind of my</p> <p>3 point. If the representation of counsel is that the</p> <p>4 38 are in the 68, that's all well and good. That</p> <p>5 still doesn't --</p> <p>6 SPECIAL MASTER: Which he's willing to</p> <p>7 stipulate today.</p> <p>8 MR. PLACITELLA: That still doesn't tell</p> <p>9 us where the samples from, what level of the mine,</p> <p>10 was it in the main ore body, was it on the side. It</p> <p>11 all matters. It's very important information to</p> <p>12 know.</p> <p>13 SPECIAL MASTER: But if they're unable</p> <p>14 to give you that kind of detail, then it strikes me</p> <p>15 that that, to use a well hackneyed phrase, that goes</p> <p>16 to the weight of the evidence, not to its</p> <p>17 admissibility.</p> <p>18 MR. PLACITELLA: But for the fact that</p> <p>19 there were maps of the mine indicating where the</p> <p>20 samples were taken from. They were identified in</p> <p>21 Mr. Gale's deposition. And they no longer exist.</p> <p>22 SPECIAL MASTER: But if they no longer</p> <p>23 exist, I can't un-ring that bell for you and I can't</p> <p>24 say to you that because they no longer exist in the</p> <p>25 absence of you demonstrating an intentional act to</p> |
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| <p>1 don't --</p> <p>2 MR. PLACITELLA: Here's where we are.</p> <p>3 You said what evidence is there of missing material</p> <p>4 evidence?</p> <p>5 Right now we know the only study that</p> <p>6 was ever done by Engelhard of its own mine, the only</p> <p>7 study ever done initiated by Engelhard of its own</p> <p>8 mine by virtue of its own scientist's testimony, we</p> <p>9 don't have the results of that study.</p> <p>10 SPECIAL MASTER: No, you have the</p> <p>11 results. You just don't have the backup on it.</p> <p>12 MR. PLACITELLA: No. We don't know from</p> <p>13 looking at this document where the samples were taken</p> <p>14 from.</p> <p>15 SPECIAL MASTER: No, Mr. Placitella.</p> <p>16 You have received the representation of reputable</p> <p>17 counsel that that information is included in this</p> <p>18 document.</p> <p>19 Now, you can say: I'd like to see the</p> <p>20 backup, and if you don't have the backup, I have a</p> <p>21 problem with it.</p> <p>22 But you can't just discard the</p> <p>23 representation of counsel. It means something.</p> <p>24 MR. PLACITELLA: It does, your Honor.</p> <p>25 SPECIAL MASTER: It certainly does to</p> | <p>1 deceive, that you are now entitled to a negative</p> <p>2 horribleness in respect of it.</p> <p>3 MR. PLACITELLA: But we have 20 years of</p> <p>4 an intentional act to deceive, your Honor. We have</p> <p>5 them telling courts and litigants that there is no</p> <p>6 evidence other than the Ashton affidavit.</p> <p>7 SPECIAL MASTER: Okay. We're retreading</p> <p>8 well trod land. And I thought I heard you say --</p> <p>9 might be wishful thinking on my part -- that that was</p> <p>10 your final point.</p> <p>11 MR. PLACITELLA: The rest we've gone</p> <p>12 through. It's in our brief. They actually admit in</p> <p>13 their briefs about what exhibits are missing. They</p> <p>14 do say --</p> <p>15 SPECIAL MASTER: Mr. Placitella, you</p> <p>16 want to take a moment to talk to Mr. Pratter before</p> <p>17 you sum up? I'm happy to allow you that. I mean, if</p> <p>18 you want to step outside, we'll stay right here.</p> <p>19 MR. PRATTER: Yeah, I would like to do</p> <p>20 that.</p> <p>21 SPECIAL MASTER: Mr. Pratter, would like</p> <p>22 it, so let's do that.</p> <p>23 MR. PLACITELLA: That's fine.</p> <p>24 (Break.)</p> <p>25 SPECIAL MASTER: Mr. Placitella.</p> |

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| <p>1 factual points because there were a couple of things 2 that Mr. Placitella said that I wanted to clarify. 3 And I do want to preface -- 4 SPECIAL MASTER: Something that 5 plaintiffs said. 6 MR. FARRELL: Thank you. I was just 7 going to say it wasn't meant to be taken any other 8 way than trying to clarify the record. 9 Let me start where he finished on the 10 study of the mine and the 38 samples. 11 First, I think plaintiffs submitted that 12 it was the only test ever done of the mine. It's 13 just not correct. 14 SPECIAL MASTER: I know that. I've put 15 that down to rhetoric. 16 MR. FARRELL: Fair enough. And in 17 fact, the other point I was going make is there are 18 multiple documents from 1979 alone and that study, 19 including documents authored by Peter Gale, Dr. 20 Hemstock, Mr. Triglia that have been produced to the 21 plaintiffs because they're not privileged. 22 SPECIAL MASTER: We know that the U. S. 23 Geological Survey conducted a survey of the mine. 24 MR. FARRELL: Exactly. 25 SPECIAL MASTER: We also know that</p> | <p>1 lot of inconsistencies and internal contradictions in 2 the arguments being submitted to the Court. It can't 3 both be that that document proves there were millions 4 of fibers in Emtal talc, but plaintiffs also have no 5 idea whether that test data relates to Emtal talc. 6 Point 3 on the 38 samples, you heard 7 argument about the micrographs that are referenced in 8 the document. 9 And I think this highlights a critical 10 point your Honor made, which is about trying to 11 connect the dots, which I would put another way, 12 being having actual foundation for the sort of 13 evidentiary conclusions the Court would have to 14 reach. 15 SPECIAL MASTER: See, you're a lot 16 fancier than I am. I like to stick with connecting 17 the dots. 18 MR. FARRELL: Let us assume that there 19 were micrographs attached to that document from 20 September of 1979. Were they discarded on October 21 1st of 1979? Because if they were -- 22 SPECIAL MASTER: Well, if I recall your 23 brief, you had an illustration of a micrograph that, 24 unless I'm Jackson Pollock, doesn't tell me anything 25 because it's an abstract painting as far as I'm</p> |
| <p style="text-align: center;">Page 199</p> <p>1 somebody else went and get some samples from the 2 outside of the mine. Whoever that was I don't know. 3 I don't think that was the same fellow as the 4 U.S.G.S. fellow. 5 But the record is what the record is. 6 And as I think everyone is beginning to realize, I do 7 read this stuff. 8 MR. FARRELL: You do, your Honor. 9 SPECIAL MASTER: And I tend to retain 10 some of it, not all of it. 11 MR. FARRELL: Point 2 I wanted to make 12 about the 38 samples, I would ask your Honor to look 13 back at plaintiffs' slides from the February 23rd 14 hearing, because today I heard them argue that they 15 have no way of knowing whether those 38 -- the 16 document that was up on the screen, the September 17 1979 Georgia Tech document, whether the test results 18 in there were related to the mine and Emtal talc. 19 Well, slide 42 from plaintiffs' 20 presentation is that exact document called out in 21 plaintiffs' deck with the very test results that 22 correspond to the 1979 study highlighted with the 23 heading saying millions of asbestos fibers were 24 confirmed. 25 I point this out only to say there's a</p> | <p style="text-align: center;">Page 201</p> <p>1 concerned. 2 MR. FARRELL: That too is correct, your 3 Honor. 4 SPECIAL MASTER: Okay. 5 MR. FARRELL: The point here is the lack 6 of evidentiary foundation from the plaintiffs showing 7 that things like missing photomicrographs, to the 8 extent they're even missing at all, were still in 9 existence at the time there was a duty to preserve. 10 SPECIAL MASTER: But that's really not 11 their point. 12 The point is a cumulative one, because I 13 don't think that the plaintiffs are saying if you 14 look at this, this proves the case. 15 I think what plaintiffs are saying, and 16 correct me if I'm wrong, is that if you look at the 17 aggregate of all of these things, there is enough 18 smoke here to conclude that there has to be fire 19 somewhere. 20 And if you conclude that there has to be 21 fire somewhere, we have satisfied our <i>prima facie</i> 22 burden, and you really ought to look at the actual 23 documents and determine if they are privileged. 24 Now, that is a grotesque simplification 25 of what plaintiffs are arguing. But that's what I</p> |

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| <p style="text-align: center;">Page 202</p> <p>1 understand them to say.</p> <p>2 MR. FARRELL: To continue the Court's</p> <p>3 analogy, the problem is that for much of the facts</p> <p>4 cited to your Honor, there isn't even smoke.</p> <p>5 That is the point I was trying to make</p> <p>6 is that let us say that the photomicrographs from a</p> <p>7 document in 1979 are part of the proof, because I</p> <p>8 agree with you it's not the one thing they point to,</p> <p>9 how is it smoke suggesting fire if the</p> <p>10 photomicrographs have absolutely no evidentiary value</p> <p>11 with respect to the spoliation and/or crime fraud?</p> <p>12 There's no evidence in the record that</p> <p>13 those documents existed at a time there was a duty to</p> <p>14 preserve.</p> <p>15 Plaintiffs certainly haven't argued</p> <p>16 there was a duty to preserve as early as 1979.</p> <p>17 This also I think takes us to the</p> <p>18 second --</p> <p>19 SPECIAL MASTER: No. But what they're</p> <p>20 saying is that by 1983 -- actually before then,</p> <p>21 really 1982, when the Westfall case was filed, that</p> <p>22 triggered your obligation to preserve. And your</p> <p>23 obligation to preserve has continued pretty much</p> <p>24 unabated from then until now. That is what I think</p> <p>25 they are saying.</p> | <p style="text-align: center;">Page 204</p> <p>1 Candidly, I will say to you that I've</p> <p>2 very reluctantly come to the conclusion that I don't</p> <p>3 know enough to know. And it tells me that maybe</p> <p>4 there is some worth to the science day that you guys</p> <p>5 keep wanting to have.</p> <p>6 I will tell you that it was my now</p> <p>7 unreasonable expectation to have a decision out</p> <p>8 before next Monday. But I'm pretty sure I'm not</p> <p>9 going to be able to do that. And I'm pretty sure</p> <p>10 I'm not going to be able to do that because of my</p> <p>11 ever-growing concern that I just don't know enough to</p> <p>12 know that when plaintiffs say look at this report,</p> <p>13 this report says there was asbestos in the talc and</p> <p>14 they should have reported that as a fact to the world</p> <p>15 at large, and defendants say look at that same</p> <p>16 report, that does not prove that there was asbestos</p> <p>17 in the talc and therefore our representations were</p> <p>18 all correct, that I know enough from a scientific</p> <p>19 point of view to be able to figure out who's right</p> <p>20 and who's wrong.</p> <p>21 But anyway, I didn't mean to interrupt</p> <p>22 you. I'm going to come back to that later on.</p> <p>23 MR. FARRELL: Not at all. Let me make</p> <p>24 two other brief points just in the interest of time.</p> <p>25 SPECIAL MASTER: Take as much time as</p> |
| <p style="text-align: center;">Page 203</p> <p>1 And when you're talking about 1982 and</p> <p>2 you're talking about test results in 1979, you're</p> <p>3 talking about a three year period of time that it's</p> <p>4 entirely reasonable to expect that Engelhard would</p> <p>5 have retained those test results during that period,</p> <p>6 and once the obligation to preserve ripened, once the</p> <p>7 Westfall case was filed, you should have kept all</p> <p>8 that stuff.</p> <p>9 Now, are there explanations for why it</p> <p>10 wasn't kept? I'm certain that from among all these</p> <p>11 papers here there are a lot of those explanations.</p> <p>12 But that's really the crux of what I</p> <p>13 hear plaintiffs saying.</p> <p>14 Bearing in mind that, you know, I'm very</p> <p>15 much aware that plaintiffs have the burden of</p> <p>16 demonstrating that the crime fraud exception in the</p> <p>17 statute and the rule applies here, they have to do</p> <p>18 it -- they have to satisfy that burden on a prima</p> <p>19 facie basis. That's their burden of proof.</p> <p>20 I think we all recognize that prima</p> <p>21 facie is about as low a burden of proof as one can</p> <p>22 ever come up with.</p> <p>23 So the question is, is there enough here</p> <p>24 to satisfy that burden? And that's the one trouble</p> <p>25 that I'm having.</p> | <p style="text-align: center;">Page 205</p> <p>1 you want. But I'll be home by nine o'clock, so...</p> <p>2 MR. FARRELL: You had asked Mr.</p> <p>3 Placitella a pretty straightforward question earlier,</p> <p>4 which is --</p> <p>5 SPECIAL MASTER: Hopefully all my</p> <p>6 questions are straightforward.</p> <p>7 MR. FARRELL: Well, this one was</p> <p>8 particularly straightforward.</p> <p>9 SPECIAL MASTER: Okay.</p> <p>10 MR. FARRELL: Do you have any evidence</p> <p>11 that information, documents were improperly withheld</p> <p>12 in the Westfall case?</p> <p>13 And you first got a yes and then you got</p> <p>14 a -- with a caveat and so on and so forth. And then</p> <p>15 I heard him say -- I heard plaintiff say there's</p> <p>16 nothing in the record showing that there was a basis</p> <p>17 for withholding certain documents.</p> <p>18 And this is the point I wanted to</p> <p>19 clarify. The very first page of Dr. Hemstock's</p> <p>20 March 1983 deposition begins with a statement from</p> <p>21 Engelhard's counsel. And on the first page of the</p> <p>22 deposition he explains: We have withheld very, very</p> <p>23 few documents which we consider privileged. Those</p> <p>24 are documents which are between counsel and the</p> <p>25 client and at sometime later we will provide you with</p> |

52 (Pages 202 to 205)